No. 12,376

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF HONOLULU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

WILFORD D. GODBOLD,
City and County Attorney of Honolulu,
FRANK A. McKINLEY,
Deputy City and County Attorney of Honolulu,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

No. 12,376

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF HONOLULU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

THE CITY AND COUNTY OF HONOLULU IS ENTITLED TO SUBSTANTIAL DAMAGES FOR THE TAKING OF ITS STREETS AND HIGHWAYS.

A.

Appellee, while conceding that streets are "private property" within the meaning of the 5th Amendment (Appellee's Br. 4), asserts, in effect, that it has the right, after deliberately selecting a peninsular perimeter whose taking requires the construction of no substitute streets, to condemn first the land area within the perimeter, then condemn the street area within the perimeter and pay therefor the sum of only

One Dollar ($1.00), irrespective of the magnitude of the street area taken or the vastness of the sum of tax money reflected in the completed thoroughfares. That protection afforded by the 5th Amendment would be nullified if such overzealous practice, or possibly the word is chicanery, were not checked by the Judicial branch of the Government.

B.

Appellee states in part "* * * it is now well settled that the correct measure of compensation for the taking of streets and highways is the cost of furnishing a substitute way if such relocation is necessary, to serve persons outside the condemned area, and when, as here, there is no necessity for such relocation only nominal consideration may be awarded." (Appellee's Br. 4.) It is stated here, in effect, that the condition precedent to necessary relocation, is the breaking of the highway "circuit"; that such relocation is necessary for the reason that persons outside the condemned area must be given access to the highway "circuit".

It is conceded in the instant case, no persons outside the condemned area need be given access to the highway "circuit" and such was stated to the trial judge (R-114). It is not conceded, however, that the remaining taxpayers in the City and County of Honolulu are not damaged by the taking of 34.03 acres of streets (approximately 25,000 lineal feet). In the words of Mr. Chief Justice Taft, *United States v. Brown,* 263 U.S. 77, at page 83,

> "* * * It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole."

It would appear from the foregoing language that Mr. Chief Justice Taft geared his thinking into that basic principle in the law of Eminent Domain to the effect that where a portion of the whole is taken, the owner must be compensated for the part taken, together with severance damages to the remainder. A city's network of streets is a system; if a portion of that system is taken, the city is entitled to compensation for the value, if any, of the part taken, together with severance damages, if any, to the remainder.

There appears to have been no necessary relocation in the *Brown* case, in the sense that that phrase is interpreted by Appellee. But just as the Supreme Court concluded that the American Falls Taxpayers were injured by the taking of three-fourths of their streets, so it is reasonable to conclude that the taxpayers of the City and County of Honolulu are injured when 34.03 acres of their streets are taken. And over and above that consideration, the City and County of Honolulu owned [by stipulation] the fee

title to all but one or two per cent of the land taken, and, the record shows the City and County could have delivered merchantable title to a substantial portion of that area or could have appropriated it to other public purposes (R-110-111). See also Section 6101, Revised Laws of Hawaii 1945, which reads in part as follows:

> "* * * and to sell or lease such excess property with such restrictions as may be dictated by considerations of public policy in order to protect and preserve such improvement; provided, however, that when any such excess property shall be disposed of by any county it shall be first offered to the abutting owner or owners for a reasonable length of time and at a reasonable price and if such owner or owners fail to take the same then it may be sold at public auction."

C.

It is not the intention of the City and County, nor is it included within its theory of recovery, to deprive the abutting property owners of reasonable access to their property. Therefore, that portion of Appellee's argument addressed to the abandonment of the entire way (Appellee's Br. 6 and 7) is not responsive to the facts at hand (R-90 and Arguments III and IV Appellant's Brief. To the extent, however, that Appellee's argument includes the abandonment of a portion of the way we submit the following:

The attorneys for the United States proceed upon the assumption that narrowing a street, *ipso facto* diminishes the value of the property served by said street. That assumption is fallacious. It is no truer

than its converse; widening a street *ipso facto* enhances the value of the property served thereby. The *ipso facto* widening or narrowing of a street is not susceptible of a universal postulate in determining the value of land thereby served.

In an area zoned for residential purposes, as in instant case, minimum width streets are desirable because they encourage minimum traffic and at a minimum rate of speed. Widening such streets could diminish the value of land served thereby. Conversely, narrowing oversize [extra width] streets in a residential zone—let us say, by establishing a parkway strip down the middle—could enhance the value of land served thereby.

We submit, therefore, that the correct concept is as follows: whether the narrowing or widening of a street, diminishes or enhances the value of the property served thereby, depends upon the facts and circumstances of *each particular case.*

D.

But even assuming that narrowing the streets in question will diminish the value of the land served thereby, there is substantial authority for the proposition that the abutting owner does not have a vested right in the *status quo* of a public way; that alteration of public way does not constitute a taking of the abutting property within the meaning of the 5th and 14th Amendments until the abutting owner is deprived of reasonable access to his property. Quoting from *Federal Eminent Domain,* Lands Division, Department of Justice, at page 71:

"It is the general rule that an abutting owner has no such right in the maintenance of the status quo as to be entitled to compensation for the closing of a highway;[100] but the rule would be otherwise in most jurisdictions where such closing deprived the owner of all means of access to any highway,[101] sometimes even where the discontinued street, though laid out on maps, had never been opened.[102] Despite a conflict of authority as to whether an abutting owner has a compensable property right in maintenance of the same degree and means of access previously enjoyed,[103] the best considered cases seem to hold that he has not.[104]

---

[100]*Fearing v. Irwin,* 55 N.Y. 486 (1874). See I *Nichols, Eminent Domain* (2d ed. 1917), sec. 115, and cases cited in footnote 70 therein.

[101]See I *Nichols, Eminent Domain* (2d ed. 1917), sec. 115, cases cited in footnote 68 therein; and *cf. Central Trust Co. v. Hennen,* 90 Fed. 593 (C.C.A. 6, 1898); *Reining v. New York, L. & W. R. Co.,* 128 N.Y. 157, 28 N.E. 640 (1891); *Ogden v. New York,* 141 App. Div. 578, 126 N.Y.S. 189 (1st Dep't 1910); and cases cited in *Nichols loc. cit. supra,* footnotes 65-67 and 74-76 therein. For contrary rule, see cases cited in footnote 69 therein.

[102]*E.g., In re White Plains Road,* 179 App. Div. 216, 166 N.Y.S. 435 (1st Dep't 1917).

[103]See I *Nichols, Eminent Domain* (2d ed. 1917), sec. 115, and cases cited in footnotes 71-73 therein.

[104]*Mead v. Portland,* 200 U.S. 148 (1906) (alterations in grade blocking one of several means of access to wharf); *Meyer v. Richmond,* 172 U.S. 82 (1898) (blocking street at a distance from plaintiff's property); *Smith v. Corporation of Washington,* 20 How. 135 (1857) (alterations in grade of street); *Lockwood v. Portland,* 288 Fed. 480 (C.C.A. 9, 1923) (discontinuance of street at distance from plaintiff's property); *Stanwood v. Malden,* 157 Mass. 17, 31 N.E. 702 (1892) (discontinuance of street on which part of plaintiff's land abutted where some means of access remained); *Smith v. Boston,* 7 Cush. 254 (Mass. 1851) (discontinuance of part of street other than that upon which plaintiff's land abutted); *R. & A. Realty Corp. v. Pennsylvania R. Co.,* ..... N.J. ....., 3 A. (2d) 293 (Sup. Ct. 1938). But *cf. Egerer v. New York, Central & H. R. Co.,* 130 N.Y. 108, 29 N.E. 95 (1891) (cutting off all means of access except on foot held compensable)."

Suppose the abutting property owners are afforded more than reasonable access? Suppose the lands in question, abut an oversize [extra wide] street? Would not the City and County have a right to shrink the width of the street to a point where the property owners are yet permitted reasonable access?

What is a street of reasonable width?

What constitutes reasonable access?

Are not these questions of fact to be determined by a jury or court, as the case may be, after considering the facts and circumstances of each and every particular case? These questions are no more complicated, nor the answers thereto any more speculative, than those questions determined in the *Wheeler Township* case *(U. S. v. Wheeler Township,* 66 F. (2d) 977 at 984).

Having then determined the minimum width beyond which the City could not shrink a given street, the excess of that taken, over that which is found to have been appropriated to a special use, is the arithmetical balance for which the condemnee is entitled to be paid just compensation; a principle, the embodiment of which found its expression in the award of $5,303.00 to New York City as being the salvage value of the Washington Bridge which was part of the highway taken by the United States in the expansion of the Brooklyn Navy Yard *(U. S. v. New York, City of,* 168 F. (2d) 387). The United States Court of Appeals, 2 Cir., in that case, reaffirmed the measure of compensation as initially laid down in the

Des Moines case. If One Dollar ($1.00) only should have paid for the highway, should $5,303.00 have been paid for the Bridge which was part and parcel of highway?

In the event a private way of 80 feet width were condemned and that fee were subject to a perpetual easement of way in an abutting owner which easement was limited to 40 feet in width, would not the owner of the private way be entitled to compensation for the differential?

E.

Appellee, in justifying the taking of 34.03 acres of streets for the sum of One Dollar ($1.00) states that if the City and County were to get more than nominal consideration, it would receive an "unwarranted windfall" (Appellee's Br. 5). It might be mentioned in passing that the free and unencumbered title to 34.03 acres of improved streets for One Dollar ($1.00) is no mean bargain, in any man's language or currency. Manifestly, if there is "unwarranted windfall" in the wood pile, the United States and not the City and County, is the recipient thereof.

F.

Appellee states in substance, that since one or two per cent of the streets taken were privately owned subject to a public easement, that fact would preclude the City and County from being paid more than nominal consideration. "It seems obvious that the

same measure of compensation should be applied to all the streets condemned in this proceeding, and that it does not, as Appellant urges, vary depending upon who owns the technical legal title" (Appellee's Br. 6).

The point raised may be easily answered.

The reason that different measures of compensation should be applied, is that the City and County can deliver merchantable title, whereas the private owner can not. Quoting from pages 25 and 26 of Appellant's Opening Brief:

> "This brings us to what we consider to be a crucial distinction between the taking from private owners and the taking from a state, county or municipality. It is beyond the power or capacity of a private owner who subjects his fee to an easement in the public for road purposes to disencumber that fee. Consequently, when such land is condemned from the private owner he is awarded only nominal damages upon the basic assumption that the easement running as it does for perpetuity, in the absence of any proof to the contrary, destroys the economic utility of the land and the land thereby has only a nominal value. Should, however, that fee, encumbered as it is with an easement in the public for road purposes be acquired by a state, county or municipality having the power and capacity to abandon or change the public purpose or the use, then, in the face of such power and capacity to disencumber, the easement is tantamount to a revocable license."

II.

THE COURT BELOW ERRED IN NOT ALLOWING THE DAMAGES TO BE ASSESSED BY A JURY.

Appellant gave the Court and opposing counsel notice that it had not waived its right to a jury trial, for at the bottom of the very page in the Record cited by Appellee concerning the question of jury trial appears the following language:

> "Well, if you want to become technical, we have a demand for a jury trial in here, and we have not been afforded an opportunity to pick a jury."

The City and County does not contend it has the "constitutional right to have Twelve men sit idle and functionless in a jury box." Under its theory of recovery, there was plenty of work for the jury, but that work was left undone at the instance of the Court below.

CONCLUSION.

It is submitted that the errors of the Court below were prejudicial to the constitutional rights of the Appellant and that this Court should so hold and remand the case for trial.

Dated, Honolulu, Hawaii,
April 7, 1950.

Respectfully submitted,
THE CITY AND COUNTY OF HONOLULU,
Appellant,
By WILFORD D. GODBOLD,
City and County Attorney of Honolulu,
By FRANK A. McKINLEY,
Deputy City and County Attorney of Honolulu,
Attorneys for Appellant.